(12)

DEC 1 1945
CHARLES ELMORE CROPLEY
CLERK

United States of America

In the

Supreme Court of the United States

No. 633

FRANCIS P. SLATTERY,
Petitioner and Appellant,
vs.
ALLEN A. McDONALD, Sheriff of Ingham County,
Respondent and Appellee

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF

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PETITION FOR WRIT OF CERTIORARI

To the Supreme Court of the United States:

Francis P. Slattery, a citizen of the State of Michigan, respectfully shows:

SUMMARY OF FACTS

A Michigan statute authorizes Circuit Judges—but not Circuit Courts— to conduct secret inquisitorial proceedings (Sec. 17217, et seq. Comp. Laws 1929, Appendix A).

Since the judge functions somewhat as does a grand jury, he is commonly referred to as a one-man grand jury.

In practice, these inquisitorial proceedings are sometimes conducted by judges in chambers, sometimes in the court room behind locked doors and sometimes in secret locations away from the court building. And the practice has developed, when the inquisitor is dissatisfied with a witness' testimony, of recessing the inquisition, convening the court, and forthwith without notice or hearing, pronouncing the witness guilty of contempt of *court*.

In August, 1943, Judge Leland W. Carr, of Lansing, Michigan, acting under the statute, constituted himself a one-man grand jury to investigate charges of corruption in the Michigan Legislature. Armed with successive grants of funds which now total $500,000.00, he assembled a staff of lawyers, accountants, and investigators, who have ever since been operating under the direction of the so-called one-man grand jury.

In November, 1944, Judge Carr subpoenaed petitioner to appear before him in this secret inquisitorial proceeding. The witness responded and was examined behind locked doors, with the public excluded, and the only persons present being Judge Carr, his stenographer and a special prosecutor. At the conclusion of the examination Judge Carr recessed the inquisition, convened the Circuit Court and forthwith made the following pronouncement:

"Let the record show that the Circuit Court of Ingham County is now in open session, the grand jury room doors having been unlocked and the room opened to the public.

"Let the record further show that as Judge of this Court I have been conducting a grand jury inquiry in the matter of Petition of Herbert H. Rushton, Attorney General of the State of Michigan, for a judicial investigation concerning certain criminal offenses; that the inquiry has been conducted in accordance with the statutes in this state, Sec. 17217 and 17218 of the Comp. Laws of 1929.

"That in the course of such inquiry, I have had before me a witness one Francis Slattery, and that the witness has wilfully and contemptuously *declined and refused to answer questions of a particular nature* put to him in the course of the inquiry; and for that reason it becomes the duty of the Court, the witness not having assigned any good and sufficient reason, or any reason whatsoever for his failure and refusal to answer those questions, to adjudge said Francis Slattery guilty of contempt of court.

"Mr. Slattery, you are so adjudged" (R. 8-9).

On the following day Mr. Slattery's attorneys asked Judge Carr for a transcript of the testimony upon which this contempt judgment was based as a basis for an appeal to the Michigan Supreme Court. He stated he would grant this only when ordered by the Michigan Supreme Court (R. 50 and 55). Petitions for Habeas Corpus and Certiorari were then filed with the Michigan Supreme Court and that Court issued a Writ of Certiorari requiring the return only of the court proceedings and not of the proceedings before the inquisitor. Judge Carr made his return accordingly.

Later, however, on his own motion, Judge Carr amended his return and included parts of the examination of Mr. Slattery, indicating by asterisks that he was omitting portions of it. In some cases answers were set forth without the questions. Consistent with its original position that Judge Carr was not required to return any of the transcript, the Michigan Supreme Court ruled that he was free to return only so much as he chose to.

From the amended partial return made by Judge Carr it appears that Mr. Slattery was an employee of the Michigan National Bank and in 1941 was active in lobbying against a bill before the Michigan Legislature aimed at his bank. When he was on the witness stand before the inquisitor he was asked whether he remembered that in May of 1941 a certain legislator had approached him in a hotel lobby, as a man with whom he had been talking walked away, and stated, "I have decided to change my mind about the bank bill if I get some money." Mr. Slattery replied, "I don't recall any such thing" (R. 61). To several repetitions of substantially the same question Mr. Slattery persisted in saying he had no recollection of any such incident, but declined to answer the question "Yes" or "No."

Judge Carr further returned, "That *from substantial evidence previously submitted to the grand jury,* there was good and sufficient reason to believe" that said legislator has solicited a bribe from Mr. Slattery, and that the latter recalled the incident (R. 64). Such other evidence has never been made a part of any court record but remains locked in the breast of the inquisitor. The Michigan Supreme Court affirmed the contempt conviction. Certiorari having been denied by this court, a writ of habeas corpus was issued by the District Court at Detroit, but upon hearing the writ was dismissed. Appeal was taken to the

Sixth Circuit Court of Appeals which affirmed the District Court's order and on November 12, 1945, denied a petition for rehearing.

STATUTORY PROVISION GIVING JURISDICTION TO THIS COURT

Petitioner's summary conviction of contempt of court for alleged misconduct not committed in open court without notice or hearing was a denial of due process under Section 1 of the Fourteenth Amendment to the United States Constitution reviewable by this court under Section 240 of the Judicial Code as amended.

QUESTIONS INVOLVED

The following questions are presented:

(1) Where it is sought to convict one of contempt of *Court,* based upon alleged false testimony before a Judge acting as an Inquisitor under the Michigan Inquisitorial Statute, does due process require the filing of charges, a notice and a hearing?

(2) Where the alleged contemptuous behavior, even if committed in open court, consists of alleged false testimony, of the falsity of which the Judge does not have personal knowledge, does due process require the filing of a charge, a notice and a hearing?

(3) Is imprisonment for contempt of *court,* based upon perjury alone, a denial of due process under the Michigan contempt statutes?

HOW QUESTIONS RAISED AND DISPOSED OF IN MICHIGAN COURT

No hearing having been granted in the Circuit Court, the first opporunity of presenting the questions was in the Michigan Supreme Court, and they were there raised both in petitioner's original brief and in the petition for rehearing.

These precise questions were ignored by the Michigan Supreme Court except for the following language:

> "It was proper for Judge Carr to make an order finding petitioner guilty of contempt, not as a one-man grand jury, but as a circuit judge. It would have been an idle gesture for him to have the record of a case, in which he had sat, first written up and then submitted to himself."

REASONS FOR ALLOWANCE OF WRIT

A Writ of Certiorari should issue from this court for the following reasons:

(a) It is now the practice in Michigan of Judges who are operating under the Michigan Inquisitorial Statute, when they disbelieve the testimony of a witness, to convene court and forthwith pronounce judgment of guilt of contempt of court. Though a clear violation of both the State and Federal Constitutions, this practice has now been sanctioned formally by the Michigan Supreme Court.*

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*Other recent summary orders for convictions of contempt of court for alleged false swearing in inquisitorial proceedings are:

By Judge (now Senator) Ferguson:

John P. McCarthy, August 31, 1939, on charge that he did "wilfully, deliberately and corruptly testified falsely." Judge Ferguson refused McCarthy a copy of the transcript as a basis for an appeal. The Michigan Supreme Court affirmed his action on the ground the question was moot, though his conviction resulted in his suspension from the police force. (*McCarthy v. Judge*, 294 Mich. 368.)

(Continued next page)

(b) There has developed the further practice of such Judges refusing to make available for an appeal a transcript of the testimony upon which the contempt conviction is based, and this practice is likewise now sanctioned by the Michigan Supreme Court.

(c) The net result of these holdings is that Inquisitors are now given the power to imprison a citizen whose testimony does not suit them and such citizen is not only deprived of a hearing but is denied a copy of the record on which his conviction is founded, as a basis of review, except as to such parts as the Inquisitor sees fit to give him.

(d) Unless this Court intervenes, therefore, Michigan citizens will henceforth be deprived of their constitutional rights.

(e) The three Federal questions here presented have not been passed upon by this Court.

Frank J. Clesson, August 24, 1940, on charge that he "answered questions propounded to him by this Court evasively and repeatedly gave contradictory answers to the same questions." When Clesson petitioned the Supreme Court for habeas corpus, Judge Ferguson on his own motion vacated his order of conviction.

Alvie W. Casey, August 26, 1940, on charge that he "answered evasively and repeatedly gave contradictory answers."

George J. Weiss, December 8, 1941, on charge that he "gave evasive and contradictory answers."

George J. Weiss, December 11, 1941, on charge that he "gave evasive and contradictory answers."

St. Aubin Jr., January 6, 1942, on charge that he "gave incorrect, evasive and contradictory answers."

By Judge Carr:

Charles S. Blondy, September 15, 1943, for "returning evasive and equivocal answers to questions and by giving contradictory testimony."

George Bonnier, April 22, 1944, for having "returned evasive, equivocal and contradictory answers and has refused to answer questions on matters concerning which *it is reasonable to suppose he has full knowledge.*" (Certified copies of the orders in the foregoing cases have been filed in this court.)

PRAYER

Wherefore, Petitioner prays that a Writ of Certiorari issue out of and under the seal of this Court directed to the United States Circuit Court of Appeals for the Sixth Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the Record and Proceedings of said cause to the end that this cause may be reviewed and determined by this Court and the judgment of said Circuit Court of Appeals be reversed and petitioner discharged.

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BRIEF SUPPORTING PETITION FOR CERTIORARI

OPINIONS BELOW

The opinion of the Michigan Supreme Court is reported in 310 Mich. 458, and 17 N. W., 2nd, 251.

The opinion of the Sixth Circuit Court of Appeals has not been reported at the time this brief was prepared.

GROUNDS ON WHICH THE JURISDICTION OF COURT IS INVOKED

The jurisdiction of this court is invoked upon the ground that the summary conviction of a citizen of contempt of court without notice or hearing for allegedly false testimony in inquisitorial proceedings under the Michigan Statute is a deprivation of liberty without due process of law, in violation of Section 1, of the Fourteenth Amendment to the Constitution of the United States.

SPECIFICATION OF ERRORS RELIED UPON

The questions involved, set forth in the Petition for Certiorari, constitute a specification of errors relied upon.

FACTS

The facts have been sufficiently stated in the Petition and will not be here repeated.

Due Process of Law, Under the Federal Constitution, Requires that One Charged With Contemptuous Misbehavior Not Committed in Open Court Be Given Notice of the Charge and a Hearing

Due process of law requires that one charged with contempt of court, based upon a misbehavior not occurring in open court, be given notice of the charge and a hearing thereon.

This proposition will not be disputed. It has been expressed by this court in the following language:

> "Due process of law, therefore, in the prosecution of contempt, except of that committed in *open court*, requires that the accused should be advised of the charges and have a reasonable opportunity to meet them by way of defense or explanation. We think this includes the assistance of counsel, if requested, and the right to call witnesses to give testimony, relevant either to the issue of complete exculpation or in extenuation of the offense and in mitigation of the penalty to be imposed."
>
> *Cooke v. U. S.*, 267 U. S. 517, 45 S. Ct. 290, 69 L. Ed. 767.

The Michigan statute covering contempts expressly provides for notice and a hearing. (Sec. 13910-13912 C. L. 1929, Appendix B). And the Michigan courts recognize that a disregard of the statutory provisions is a violation of the due process clause.

In re Wood, 82 Mich. 75;
In re Smiley, 235 Mich. 151;
In re Venchell, 279 Mich. 690;
In re Na Lepa, 298 Mich. 310.

A Judge Acting as Inquisitor Does Not Act as a Court. Therefore, Misbehavior Before An Inquisitor Is Not a Contempt in Open Court Punishable Summarily

The Michigan Inquisitorial Statute confers inquisitorial powers upon judges, not upon courts. In actual practice judges recognize this fact and make no pretense of functioning as courts. If they use the court rooms they do so with the doors locked. Frequently, the inquisitorial chambers are at a secret location away from the court house. No court record is made of the inquisitor's activities, other than judgments of contempt of court and grants of immunity. The court room doors may remain locked and the court fail to convene for weeks or months at a time.

Thus, the basic fact which is held to justify a summary conviction for contempt of court is absent in the case of contempuous conduct toward the inquisitor. That fact is the necessity for prompt vindication of the dignity of the court before the public. *(Cooke v. U. S., supra.)*

It follows that the contempt powers of the inquisitor should be limited to those which the inquisitorial statute expressly confers—the power to punish for failure to answer a subpoena or for refusal to answer a question.

In the instant case the Michigan Supreme Court has laid down the rule that contempt of an inquisitor is *ipso facto* contempt of court and punishable as such. However, even if we accept the proposition that the inquisitor bears such a relation to court that contempt of him may be translated into contempt of court, the fact remains that the contempt was not committed in *open court*. Due process then requires that one be charged with this contemptuous conduct and be granted a hearing before it can be made the basis of a judgment of conviction of contempt of

court. For if we assume that the inquisitor bears such relation to the court as to justify proceedings for contempt of court based upon misconduct before the inquisitor, we then have a situation parallel with that of a witness giving testimony before a grand jury. And it is uniformly held that contemptuous conduct before a grand jury can be the basis of a judgment of conviction of contempt of court only after the contemner has been given notice and a hearing before the court.

> *United States v. McGovern,* 60 F. (2nd) 880;
> *O'Connell v. United States,* 40 F. (2nd) 201;
> *Camarota v. United States,* 111 F. (2d) 243;
> *In re Michael,* 146 F. (2nd) 627.

Even Assuming Petitioner's Testimony Had Been Given in Open Court, the Court Had No Personal Knowledge That Petitioner's Testimony Was False and Due Process Requires a Hearing on the Question of the Truth or Falsity of the Testimony

Where the falsity of a witness's testimony is not self-evident, the following rule, laid down in *Ex parte Savin,* 131 U. S. 267, 9 S. Ct. 699, 33 L. Ed. 150, applies:

> "In cases of misbehavior of which the judge cannot have such personal knowledge, and is informed thereof only by the confession of the party, or by the testimony under oath of others, the proper practice is, by rule or other process, to require the offender to appear and show cause why he should not be punished."

Here, Judge Carr admits lack of personal knowledge and frankly states "that from substantial evidence previously submitted to the grand jury there was good and sufficient reason to believe" that petitioner's testimony was false.

In such a case, even had the testimony occurred in open court, the court is without power to punish summarily.

Bowles v. United States, 44 F. (2nd) 115;
In re Gottman, 118 F. (2nd) 425;
People v. Tomlinson, 296 Ill. App. 609, 16 N. E. (2nd) 940;
People v. Butwill, 312 Ill. App. 218, 38 N. E. (2nd) 377.

In *Clark v. United States,* 61 Fed. (2nd) 695, an alleged false statement was made by a juror. The court says:

> "The alleged contempt while within the presence of the court, could not be known to the court in its judicial knowledge or observation, and hence there could not be summary punishment. * * * Due process of law entitled appellant to be informed of the alleged contempt and of what it consisted and also to a reasonable opportunity for preparation of a defense."

This case came before this court but not upon this issue. (*Clark v. United States,* 289 U. S. 1, 53 Sup. Ct. 465, 77 L. Ed. 993.)

Imprisonment for Contempt of Court Based Upon Perjury Alone Is a Denial of Due Process Under the Michigan Statutes

The Michigan Statute insofar as pertinent, provides:

> "Section 13910. CONTEMPT IN COURT OF RECORD; GROUNDS. Section 1. Every court of record shall have power to punish by fine or imprisonment, or both, persons guilty of any neglect or violation of duty or misconduct, in the following cases, and no others:
>
> 1. Disorderly, contemptuous, or insolent behavior, committed during its sitting, in its imme-

diate view and presence, and directly tending to interrupt its proceedings, or to impair the respect due to its authority;

2. Any breach of the peace, noise or disturbance, directly tending to interrupt its proceedings;"

It will be observed that to constitute contempt of court, the alleged misconduct must (a) be committed during a sitting of the court, (b) be in its immediate view and presence and (c) directly tend to interrupt its proceedings or to impair the respect due to its authority.

Just as under the Federal statute it must appear that the alleged perjury constituted an obstruction to the administration of justice (*In re Michael,* decided by this court November 5, 1945), so under the Michigan Statutes it must appear that the alleged perjury either tended to directly interrupt court proceedings or to impair the respect due to its authority; and further that such perjury was committed during the court sitting and in its immediate view and presence.

In our original brief (pp. 38-9) in the Michigan Supreme Court we quoted at length from *In re Hudgings,* 249 U. S. 378, 73 L. Ed. 656, 39 Sup. Ct. R. 337. But the Michigan court ignored that case in its decision. The doctrine of the Hudgings case has since been re-affirmed and clarified in *in re Michael, supra.*

Respectfully submitted,

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APPENDIX A

Michigan Inquisitorial Statute— Michigan Compiled Laws 1929

17217. Whenever by reason of the filing of any complaint, which may be upon information and belief, any justice of the peace, police judge or judge of a court of record shall have probable cause to suspect that any crime, offense, misdemeanor or violation of any city ordinance shall have been committed within his jurisdiction, and that any person may be able to give any material evidence respecting such offense, such justice or judge in his discretion may, and upon the application of the prosecuting attorney, or city attorney in the case of suspected violation of ordinances, shall require such person to attend before him as a witness and answer such questions as such justice or judge may require concerning any violation of law about which he may be questioned; and the proceedings to summon such witness and to compel him to testify shall, as far as possible, be the same as proceedings to summon witnesses and compel their attendance and testimony, and such witnesses shall be entitled to the same compensation as in other criminal proceedings.

17218. If upon such inquiry the justice or judge shall be satisfied that any offense has been committed and that there is probable cause to suspect any person or persons to be guilty thereof, he may cause the apprehension of such person or persons by proper process and, upon the return of such process served or executed, the justice or judge shall proceed with the case, matter or proceeding in like manner as upon formal complaint. And if upon such inquiry the justice or judge shall find from the evidence that there is probable cause to believe that any public officer, elective or appointive and subject to removal by law,

has been guilty of misfeasance or malfeasance of office or wilful neglect of duty or of any other offense prescribed as a ground of removal, the said justice or judge shall make a written finding setting up the offense so found and shall serve said finding upon the public officer, public board or body having jurisdiction under the law to conduct removal proceedings against said officer. And said finding shall be a sufficient complaint as a basis for removal of said officer and the public officer, public board or public body having jurisdiction of removal proceedings against said officer, shall proceed in the method prescribed by law for a hearing and determination of said charges. And in respect of communicating or divulging any statement made by such witnesses during the course of such inquiry, the justice, judge, prosecuting attorney and other person or persons who may, at the discretion of such justice, be admitted to such inquiry, shall be governed by the provisions of law relative to grand jurors.

17219. Any witness neglecting or refusing to appear in response to such summons or to answer any questions which such justice or judge may require material to such inquiry, shall be deemed guilty of contempt and shall be punished by a fine not exceeding one hundred (100) dollars or imprisonment in the county jail not exceeding sixty (60) days or both at the discretion of the court: Provided, That if such witness after being so sentenced shall appear and answer such questions, the justice or judge may in his discretion commute or suspend the further execution of such sentence.

17220. No person shall upon such inquiry be required to answer any questions the answers to which might tend to incriminate him except upon motion in writing by the prosecuting attorney which shall be granted by such justice or judge, and any such questions and answers shall be

reduced to writing and entered upon the docket or journal of such justice or judge, and no person required to answer such questions upon such motion shall thereafter be prosecuted for any offense concerning which such answers may have tended to incriminate him.

APPENDIX B

Compiled Law of Michigan—1929

CHAPTER V.

OF PROCEEDINGS FOR CONTEMPT

13910. CONTEMPT IN COURT OF RECORD; GROUNDS. Section 1. Every court of record shall have power to punish by fine or imprisonment, or both, persons guilty of any neglect or violation of duty or misconduct, in the following cases, *and no others:*

1. Disorderly, contemptuous, or insolent behavior, committed during its sitting, in its immediate view and presence, and directly tending to interrupt its proceedings, or to impair the respect due to its authority;

2. Any breach of the peace, noise or disturbance, directly tending to interrupt its proceedings;

3. All attorneys, counselors, clerks, registers, sheriffs, coroners, and all other persons in any manner duly elected or appointed to perform any judicial or ministerial services, for any misbehavior in such office or trust, or for any wilful neglect or violation of duty therein; for disobedience of any process of such court, or any lawful order thereof, or of any lawful order of a judge of such court, or of any officer authorized to perform the duties of such judge;

4. Parties to suits for putting in fictitious bail or sureties, or for any deceit, or abuse of the process or proceedings of the court;

5. Parties to suits, attorneys, counselors, and all other persons, for the nonpayment of any sum of money ordered by such court to be paid, in cases where by law execution cannot be awarded for the collection of such sum; the disobedience of or refusal to comply with any order of such court for the payment of alimony, either permanent or temporary, or costs made in any suit for divorce or separate maintenance; and any other disobedience to any lawful order, decree or process of such court;

6. All persons for assuming to be officers, attorneys or counselors of any court, and acting as such without authority; for rescuing any property or persons, which shall be in the custody of any officer by virtue of process issued from such court; for unlawfully detaining any witness or party to a suit, while going to, remaining at, or returning from the court where such suit shall be pending for trial; and for any other unlawful interference with or resistance to the process or proceedings in any action;

7. All persons summoned as witnesses for refusal or neglect to obey such summons, or to attend or to be sworn, or when so sworn to answer any legal and proper interrogatory;

8. Persons summoned as jurors in any court, for improperly conversing with any party to a suit to be tried at such court, or with any other person in relation to the merits of such suit; for receiving communications from any such party, or from any other person in relation to the merits of such suit, without immediately disclosing the same to the court;

9. All inferior magistrates, officers and tribunals, for disobedience of any lawful order or process of a superior court, or for proceeding in any cause or matter contrary to law, after such cause or matter shall have been removed from their jurisdiction;

10. The publication of a false or grossly inaccurate report of its proceedings; but no court can punish as a contempt the publication of true, full and fair reports of any trial, argument, proceedings or decision had in such court;

11. All other cases where attachments and proceedings as for contempts have been usually adopted and practiced in courts of record to enforce the civil remedies of any party, or to protect the right of any such party.

13911. SAME; SUMMARY PUNISHMENT WHEN MISCONDUCT IS IN PRESENCE OF THE COURT. Sec. 2. When any misconduct, punishable by fine and imprisonment as declared in the last section, shall be committed in the immediate view and presence of the court, it may be punished summarily, by fine or imprisonment, or both, as hereinafter prescribed.

13912. SAME; MISCONDUCT NOT IN PRESENCE OF COURT. Sec. 3. When such misconduct is not so committed, the court shall be satisfied by due proof, by affidavit of the facts charged, and shall cause a copy of such affidavit to be served on the party accused, a reasonable time to enable him to make his defense, except in cases of disobedience to any rule or order requiring the payment of money, and of disobedience to any subpoena.

(13)

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CHARLES ELMORE CROPLEY
CLERK

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RESPONDENT'S BRIEF OPPOSING PETITION FOR CERTIORARI

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RESPONDENT'S BRIEF OPPOSING PETITION FOR CERTIORARI

I.

COUNTER-STATEMENT OF MATTER INVOLVED (*)

This counter-statement is deemed necessary in correcting the following inaccuracies and omissions in the statement of the other side (Rule 27, par. 4).

1. On June 11, 1945, this Court denied a petition for a writ of certiorari to the Supreme Court of Michigan herein (89 L. Ed. 1546; No. 1170). A forty-nine page brief was filed in support of that petition, setting up with meticulous elaboration, petitioner's claim that the State of Michigan had denied him due process of law. The

(*) Unless otherwise plainly indicated, numbers in parentheses refer to pages of the printed transcript of record.

present petition for writ of certiorari is but a re-statement of the questions previously considered by this Court.

Upon denial of his petition by this Court, petitioner filed a petition for writ of habeas corpus in the District Court of the United States, Eastern District, Southern Division (R. 2, 3, 4, 5, 6). To this petition, respondent filed an answer (R. 11, 12, 13, 14, 15), and added thereto a motion to dismiss.

The matter came on for hearing before Honorable Ernest A. O'Brien, District Judge, at Detroit, Michigan on June 25, 1945 (R. 17 ff.).

After hearing lengthy arguments of counsel, the learned District Judge granted respondent's petition to dismiss the writ of habeas corpus. The Court said in part (R. 47):

> "Of course, it is not necessary for me to even discuss this, but I think Judge Carr showed good discretion and judgment when he said, when he concluded that a man who does not remember whether someone had offered, had solicited a bribe or not, I think those things have to be so uncommon even in Mr. Slattery's life that he would remember it, and I think that was Judge Carr's judgment.
>
> "To do otherwise than dismiss this writ, I would simply sit as a superior supreme court, which I cannot do, of course. I am bound by the Supreme Court of the State of Michigan. They make our law except insofar as it is irreparable to the federal statutes or federal law. Of course, there is no federal statute involved in this litigation.
>
> "I think there is only one course open to me and that is that the motion to dismiss the writ be granted, and it is so ordered."

Petitioner thereafter took appeal to the United States Circuit Court of Appeals for the Sixth Circuit, and on October 17, 1945, that Court filed a Per Curiam Opinion affirming the judgment of the District Court (R. 78, 79).

That Opinion is, in part, as follows:

> "From due consideration of the record on this appeal and the oral arguments and briefs of the attorneys, we are of the opinion that the petitioner has not been deprived of his constitutional rights. The sentence of contempt imposed by the Circuit Court was affirmed on appeal by the Supreme Court of Michigan. In re Slattery, 310 Mich. 458. From the opinion of that Court, it clearly appears that the petitioner was properly convicted and sentenced for contempt of court under a valid state statute. The highest Court of the state held that the fact that the judge of the state Circuit Court was functioning as a one-man grand jury, pursuant to Michigan statutes, at the time the contempt was committed did not divest him of his judicial capacity; and it was pointed out that the Supreme Court of Michigan had in many other cases affirmed convictions for contempt in one-man grand jury proceedings similar to the instant case."

Now again, (this time claiming error by the Circuit Court of Appeals), petitioner seeks review by certiorari to this Court.

2. It is a distortion of fact to assert, as petitioner does, that Judge Leland W. Carr "constituted himself a one-man grand jury to investigate charges of corruption in the Michigan Legislature". Upon the filing of a complaint by the Attorney General of Michigan, Judge Carr proceeded with the one-man grand jury investigation pursuant to the statutory command. (Stat. Ann. 28.943; printed in respondent's brief, page 15).

Counsel's reference to the one-man grand jury investigation as an "inquisitorial proceeding" is one which he has conjured up for his own purposes. Such an expression finds no sanction of statute, of usage in Michigan, and certainly not of propriety.

Neither is there any justification for reference to Hon. Leland W. Carr as an "inquisitor". Reference to the pre-

vious Michigan one-man grand jury cases in which applications for certiorari have been made to the Court[1] will demonstrate this.

The further assertion that grand jury sessions are "sometimes in secret locations away from the court building" is not supported by this record. Such a statement could only be made to cast a false and ominous shadow over proceedings conducted by a most distinguished and respected Michigan jurist.

3. By it's writ of certiorari, the Supreme Court of Michigan directed Hon. Leland W. Carr to certify the proceedings before him in said cause, "but not the proceedings had in grand jury".[2]

The original return of Judge Carr to said writ disclosed that the attitude of petitioner, while being examined before the grand jury, was contemptuous; his answers to questions propounded to him were evasive; that he refused and failed to answer proper questions propounded to him (R. 56).

The return explained that petitioner's request for a copy of his grand jury testimony was denied because it covered

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[1]McCrea v. Michigan, certiorari denied Apr. 5, 1943, (318 U.S. 783);
Robinson v. Michigan, certiorari denied Dec. 20, 1943, (320 U.S. 799);
Roxborough v. Michigan, certiorari denied Oct. 16, 1944, (89 L. ed. 55); rehearing denied Nov. 13, 1944, (89 L. ed. 94);
Watson v. Michigan, certiorari denied Oct. 16, 1944, 89 L. ed. 55); rehearing denied Nov. 13, 1944, (89 L. ed. 94);
Bommarito v. Michigan, certiorari denied Mar. 5, 1945, (89 L. ed. 684);
Woodson v. Michigan, certiorari denied Mar. 5, 1945 (89 L. ed. 684).

[2]The present record does not contain writ of certiorari issued in this case by the Supreme Court of Michigan on Nov. 10, A.D. 1944. This writ is, however, contained in the former record in this cause when plaintiff sought certiorari to the Michigan Supreme Court (transcript of Record, #1170, Oct. term, 1944, pages 4, 5).

many subjects which could not be disclosed without "seriously interfering with and jeopardizing the work of the grand Jury". That in addition, such testimony was, by statute, privileged (R. 55).

The return of Judge Carr further explained that such part of the grand jury testimony as the court incorporated in it's return to the Supreme Court, was included in order to give the Court a full understanding of "matters leading up to and resulting in the adjudication against petitioner" (R. 65).

The return made by Judge Carr to the Michigan Supreme Court disclosed that the attitude of the respondent upon the stand was contemptuous; that his answers to questions propounded were evasive, and that he repeatedly refused to give answers to proper questions put to him. The return also indicated that such conduct on respondent's part obstructed the work of the court.[3]

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[3]In re Slattery, 310 Mich. 458, at page 477.

II.

COUNTER-STATEMENT OF QUESTIONS PRESENTED

We believe the following questions are here presented:

1. Was petitioner properly convicted and sentenced for contempt of court under a valid Michigan statute?
2. Does contempt of the one-man grand jury constitute contempt of court under the Michigan statute?
3. Does Section I of the Fourteenth Amendment to the Constitution of the United States limit the pre-existing, inherent power of courts to punish contempts?

III.

REASONS FOR OPPOSING THE ALLOWANCE

The Court below held that petitioner was properly convicted and sentenced for contempt of court under a valid Michigan statute. We believe this application should be denied, because:

1. Petitioner's claims under the Michigan statute here involved have been considered and adjudicated by the highest Court of the State, and this Court has previously declined to review the decision of the Michigan Supreme Court.
2. Decision by the Supreme Court of Michigan was based upon interpretation of a state statute, and no federal question was involved or decided.
3. This Court has held that Section I of the Fourteenth Amendment to the Constitution of the United States (upon which petitioner relies) does not limit the pre-existing inherent power of courts to punish contempts summarily.

IV.

ARGUMENT

Point One

Petitioner was Properly Convicted and Sentenced for Contempt of Court under a Valid State Statute.

The Court below filed a Per Curium Opinion, which was in part as follows (R. 78, 79):

> "From due consideration of the record on this appeal and the oral arguments and briefs of the attorneys, we are of the opinion that the petitioner has not been deprived of his constitutional rights. The sentence of contempt imposed by the Circuit Court was affirmed on appeal by the Supreme Court of Michigan. In re Slattery, 310 Mich. 458. From the opinion of that Court, it clearly appears that the petitioner was properly convicted and sentenced for contempt of court under a valid state statute. The highest Court of the state held that the fact that the judge of the state Circuit Court was functioning as a one-man grand jury, pursuant to Michigan statutes, at the time the contempt was committed did not divest him of his judicial capacity; and it was pointed out that the Supreme Court of Michigan had in many other cases affirmed convictions for contempt in one-man grand jury proceedings similar to the instant case."

Petitioner asserts two false propositions in his argument:

1. That conviction and sentence for contempt were had under the *general contempt statutes* of Michigan. (Petition and Brief, page 10).
2. That petitioner's conviction and sentence for contempt were based *upon perjury alone*. (Petition and Brief, page 5).

The falsity of these two basic propositions will be discussed in the above order.

Petitioner was convicted and sentenced under the contempt section of the one-man grand jury statute. (3 C. L. 1929, Sec. 17219; Stat. Ann. 28.945). *In re Slattery*, 310 Mich. 458, 462. With full realization of this fact, counsel argues that the *general contempt statutes*, (C. L. 1929, Sections 13910-13912) were not complied with. (Petition and Brief, page 10). The contempt section of the one-man grand jury statute, (printed on page 16 of petitioner's present petition and brief), provides:

> "17219. Any witness neglecting or refusing to appear in response to such summons or to answer any questions which such justice or judge may require material to such inquiry, shall be deemed guilty of contempt and shall be punished by a fine not exceeding one hundred (100) dollars or imprisonment in the county jail not exceeding sixty (60) days or both at the discretion of the court: Provided, That if such witness after being so sentenced shall appear and answer such questions, the justice or judge may in his discretion commute or suspend the further execution of such sentence."

The Supreme Court of Michigan, in affirming conviction herein, held that petitioner was properly convicted under the foregoing statute and that the sentence of sixty days was in accordance therewith. *In re Slattery*, 310 Mich. at pages 462 and 478. Counsel's discussion of the *general contempt statutes* has no legitimate place herein.

Again, counsel would apparently have this Court believe that petitioner was sentenced for contempt of court on the sole ground that he committed perjury in testifying before the court (petition and brief, pages 13 and 14). The present attempt to convince this Court that petitioner's conviction was based *upon perjury alone*, has obviously been stimulated by this Court's pronouncement on November 5, 1945. (In re Michael, 90 L. Ed. 15).

The true basis of petitioner's conviction was stated as follows (In re Slattery, 310 Mich. at page 477):

> "The return of the judge shows that there was evidence indicating that Slattery was obstructing the work of the court by wilfully giving evasive answers. The judge had the advantage of seeing the witness and the manner in which he testified.
>
> "The case is presented to us also on certiorari. The court in its return stated that the attitude of the witness upon the stand was contemptuous, that his answers to questions propounded were evasive and that he refused to give proper answers to the questions put to him."

And on page 478, the Court further said:

> "We have examined the record as submitted to us and we find there is evidence to support the judge's finding."

Petitioner's claim that his summary conviction and sentence for contempt of court was a denial of due process, is bottomed squarely on the claim that Judge Carr, in conducting the one-man grand jury proceedings, *was not acting in a judicial capacity.* The Supreme Court of Michigan answered that claim adversely to petitioner. After reviewing the cases in which a similar claim had been made, the Court concluded: (In re Slattery, 310 Mich. at page 467).

> "So that there may be no further question, we hold that the judge conducting a one-man grand jury proceeding is acting in a judicial capacity."

There is no justification in law nor in fact for the astounding claim that Judge Carr, as a circuit judge, could neither hear nor see what transpired before him as a one-man grand jury; that the contempt committed in the presence of Judge Carr as a one-man grand jury, was not committed in the presence of Judge Carr as a circuit judge.

Mr. Justice Butzel, writing the Michigan Court's opinion for affirmance, unmasked the fallacy of this position when he said (In re Slattery, 310 Mich. at page 478):

> "It was proper for Judge Carr to make the order finding petitioner guilty of contempt, not as a one-man grand jury but as a circuit judge. It would have been an idle gesture for him to have the record of a case in which he had sat, first written up and then submitted to himself."

The Supreme Court of Michigan, in construing the one-man grand jury statute, has consistently held that contempt of the grand jury constitutes contempt of court; that it is punishable under the contempt section of the one-man grand jury statute invoked in the case at bar.

> "There are many other cases wherein we have affirmed convictions for contempt in one-man grand jury proceedings similar to the one in the instant case. See People v. Bommarito, 270 Mich. 455; In re Wilkowski, 270 Mich. 687; In re Schnitzer, 295 Mich. 736; In re Ward, 295 Mich. 742; In re Cohen, 295 Mich. 748." (In re Slattery, 310 Mich. at page 467)

Since the foregoing opinion was written, the Supreme Court of Michigan affirmed conviction for contempt of court in another case arising out of the one-man grand jury proceedings before Judge Carr. *In re Selik*, 311 Mich. 713.

Determination by the Michigan Court of last resort that a circuit judge is acting in a judicial capacity while conducting a one-man grand jury, is based solely upon a construction of the local statute. Construction of a state statute raises a local, rather than a federal question. In *United States ex rel Mazy v. Ragen*, 149 F. 2d, 948, the Circuit Court of Appeals, Seventh Circuit, speaking through Circuit Judge Sparks said, in part, (page 950):

> "(5, 6) There is a further reason why we think the District Court should not have acted to discharge the petitioner here. His decision was based on his construction of the Illinois statute, which, we think, raises

a state or non-federal question rather than a federal one." (decided June 28, 1945; rehearing denied July 13, 1945).

And, In *Erie Railroad Co. v. Tompkins,* 304 U. S. 64, 82 L. Ed. 1188, Mr. Justice Brandeis, delivering the Court's opinion, said in part (304 U. S. 78, 82 L. Ed. 1194):

> "Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern * * *."

It is a well established principle that this Court will acquiesce in the construction of state enactments given by state courts of last resort.

> 11 *Am. Juris, Constitutional Law,* Sections 107, 109;
> *Tullis v. Lake Erie & Western R. Co.,* 175 U.S. 348;
> *Hawks v. Hamill,* 288 U. S. 52;
> *Morehead v. New York,* 298 U. S. 587.

In order to raise a question of due process, counsel had to take the position that the contempt was not committed in the presence of Judge Carr as a circuit judge. Since petitioner was admittedly testifying before Judge Carr, it became necessary to assert that Judge Carr was not then acting in a judicial capacity. Counsel argued at length before the Michigan Supreme Court that in conducting the examination, Judge Carr was *not* acting in a judicial capacity. The Michigan Supreme Court held that Judge Carr *was* acting in a judicial capacity, and that as a circuit judge he properly found petitioner guilty of contempt of court. This determination eliminated counsel's basis for claiming violation of due process.

This Court declined to review the opinion of the Michigan Supreme Court. (89 L. Ed. 1546; No. 1170).

The District Court of the United States, (Eastern District, Southern Division) held that the Michigan Supreme Court had passed upon every substantial question raised by petitioner and granted respondent's motion to dismiss the writ of habeas corpus. (R. 47; Order of Dismissal, R. 48).

The United States Circuit Court of Appeals, (Sixth Circuit) affirmed the judgment of the District Court and held that respondent was properly convicted of contempt of court under a valid state statute (R. 78, 79).

Petitioner again seeks certiorari to this Court on the same record as before, except for inclusion of the proceedings in the United States District Court and the United States Circuit Court of Appeals.

We respectfully contend that petitioner's present application for a writ of certiorari presents nothing which this Court has not previously passed on, and that said petition should be denied.

Point Two

There is No Substance in Petitioner's Claim that the State of Michigan Denied him Due Process of Law. (Sec. I, Fourteenth Amendment).

This Court has held that Section I of the Fourteenth Amendment to the Constitution of the United States is not a limitation on the inherent power of courts to punish for contempt.[4]

It was there said:[5]

> "Whether an attachment for a contempt of court, and the judgment of the court punishing the party for such contempt, is in itself essentially a criminal proceeding or not, we do not find it necessary to de-

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[4]Eilenbecker v. Plymouth County, 134 U.S. 31. (Cited with approval in Camarota v. U. S. 111 F. (2d) 243, page 246; certiorari denied 311 U.S. 651; 85 L. ed. 416).

[5]Opinion, page 39.

> cide. We simply hold that, whatever its nature may be, it is an offense against the court and against the administration of justice, for which courts have always had the right to punish the party by summary proceeding and without trial by jury; and that in that sense it is due process of law within the meaning of the Fourteenth Amendment of the Constitution. We do not suppose that that provision of the Constitution was ever intended to interfere with or abolish the powers of the courts in proceedings for contempt, whether this contempt occurred in the course of a criminal proceeding or of a civil suit."

Thus, the precise constitutional issue which petitioner urges for determination, has been decided adversely to him by this Court.

The claim that inherent power of courts to punish contempts summarily may become an instrument of oppression, was considered by this Court many years ago.[6]

Mr. Justice Harlan, speaking for this Court, there said:

> "It is true, as counsel suggest, that the power which the court has of instantly punishing, without further proof or examination, contempts committed in its presence, is one that may be abused and may sometimes be exercised hastily or arbitrarily. But that is not an argument to disprove either its existence, or the necessity of its being lodged in the courts. That power cannot be denied them without inviting or causing such obstruction to the orderly and impartial administration of justice as would endanger the rights and safety of the entire community."

Section I of the Fourteenth Amendment to the Constitution of the United States did not interfere with or abolish the inherent power of the Courts to punish for contempt. Petitioner was not deprived of his constitutional rights by his conviction and sentence for contempt of court.

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[6]Ex Parte Terry (1888) 128 U.S., at page 309.

V.

CONCLUSION

No Relief

We respectfully urge that respondent was properly convicted of contempt of court under a valid state statute; that he has not been deprived of his constitutional rights, and that certiorari should be denied.

Respectfully submitted,

Kim Sigler,
Special Prosecutor and Asst. Pros. Atty. Ingham County.
Victor C. Anderson,
Prosecuting Atty. Ingham County.
H. H. Warner,
Special Counsel.
Attorneys for Respondent and Appellee.

(17)

FILED
DEC 29 1945
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CLERK

United States of America

In the

Supreme Court of the United States

OCTOBER TERM, 1945

No. 633

FRANCIS P. SLATTERY,
Petitioner and Appellant,
vs.
ALLEN A. McDONALD, Sheriff of Ingham County,
Respondent and Appellee

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

REPLY TO COUNTER-STATEMENT OF FACTS

We are criticized for having "conjured up" the term "Inquisitor." As counsel for the State well knows, we adopted that term from an opinion rendered by Justice Cardozo in holding unconstitutional a similar statute. In *In re Richardson,* 247 N. Y. 401, he said:

> "Witnesses were subpoenaed to attend before Judge Scudder in a preliminary investigation and were examined in his presence after being placed under oath. Counsel for the accused official was denied the opportunity to be present and denied a transcript of the record or other information as to the substance of the testimony. The depositions of witnesses were treated as equivalent to office notes of counsel, memoranda for their private use in prospective litigation. They were not in any public record, subject to public scrutiny or to the inspection of opposing counsel. They were never to be so embodied except as insofar as it may happen that their contents may hereafter be repeated at the hearing. A preliminary investigation thus restricted is not a hearing by a Judge. *It is a search by an Inquisitor.*"

The above observations of Justice Cardozo apply word for word to Inquisitor Carr's proceedings.

We use the term "inquisitor" merely as a simple means of distinguishing the acts of Judge Carr as a court and his activities as an investigator. Calling the latter a one man grand jury proceeding does not change their nature; for grand jury proceedings are uniformly recognized as "inquisitorial" in character (e. g., *Hale v. Henkel,* 201 U. S. 43, 50 L. Ed. 652, 26 S. C. Rep. 370).

Exception is taken to our statement that inquisitorial sessions are sometimes held in secret locations. It is true this fact does not appear in the record below. But to give this court the background it is stated in our petition, and in Michigan it is a matter of common knowledge. (The author of this brief personally conferred with Judge (now Senator) Ferguson at his secret inquisitorial chambers in the National Bank Building in Detroit.)

Other matters in the Counter-Statement will be answered in the body of the argument.

ARGUMENT

I.

We advanced, as the basic proposition in this case, that the due process clause of the Federal Constitution requires that one charged with contempt not committed *in open court* be given notice and a hearing.

This proposition respondent does not challenge. But he seeks to avoid its effect by asserting that petitioner was convicted of contempt under the Michigan Inquisitorial Statute, and not under the Michigan General Contempt Statutes.

There are two answers to this contention:

1. Respondent's argument assumes that there is some difference between the powers of an inquisitor and of a court, that the sphere of the inquisitor in contempt matters is broader than that of a court, and that an inquisitor is beyond the limitations imposed by the Federal Constitution. This assumption is manifestly baseless. In an inquisitor's proceeding there is absent the basic fact which justifies a *court* in proceeding summarily,—the necessity of prompt vindication of the dignity of the *Court,* (not of the *judge),* before the public *(Cooke, v. U. S.,* 267 U. S. 517, 45 S. Ct. 290, 69 L. ed. 767). It follows that an inquisitor may never punish summarily.

2. Petitioner was not convicted under the Inquisitorial Statute. The latter authorizes the inquisitor to imprison a witness who fails to appear or who refuses to answer. But Judge Carr as inquisitor pronounced no sentence of contempt. Instead he *recessed his inquisition, opened court* and after reciting that he had been conducting an investigation under the One-Man Grand Jury Statute, that peti-

tioner had appeared before him as a witness and that petitioner had refused to answer questions, stated that it became "the duty of the *court* * * * to adjudge said Francis P. Slattery guilty of contempt of *court* (R. 9)." Thereafter he entered a written order adjudging petitioner guilty of contempt of *court* (R. 7). And no order ever was entered adjudging guilt of contempt of the "one-man grand jury."

II.

The major premise of our second proposition is thus stated in our heading (petition p. 11): "A Judge Acting as Inquisitor does not act *as a Court.*"

The State does not offer a challenge to this proposition. Instead of challenging or answering it, the State resorts to the device of misstating our position and then answering the misstatement.

In pursuance of that plan respondent states that our argument is bottomed on the proposition that Judge Carr as inquisitor does not act in a "judicial capacity." That is a gross misstatement. No such doctrine appears anywhere in our brief. Were it decisive we could demonstrate that an inquisitor does not act in a judicial capacity.* But we are unwilling that the issue be confused by the introduction of that question.

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*A Grand Jury's proceedings are not judicial.
Adams v. State of Indiana, 214 Ind. 602, 17 N. E. (2nd) 84, 18 A. L. R. 1095;
State v. Lawler, 221 Wis. 423, 267 N. W. 105 A. L. R. 568;
Coblentz v. State, 164 Md. 558, 166 A. 45, 88 A. L. R. 886.

An examining magistrate does not act judicially.
Ocampa v. U. S., 234 U. S. 91, 34 S. Ct. 712, 58 L. Ed. 1231.

Nor does a Commissioner in the United States Courts.
Todd v. U. S., 158 U. S. 278, 15 S. Ct. 889, 39 L. Ed. 982.

And see *In re Richardson*, 247 N. Y. 401, invalidating a statute similar to the Michigan Inquisitorial Statute on the ground that it conferred non-judicial powers on a judicial officer.

So for the purpose of this argument we are willing to assume that an inquisitor acts in a "judicial capacity." But just as a judge who signs an order in chambers may be said to be acting in a "judicial capacity," and just as one may not be punished summarily by a judge for conduct toward the judge in chambers (*Cooke v. U. S.*, 267 U. S. 517, 45 S. Ct. 290, 69 L. ed. 767), so an inquisitor may not punish summarily for a misconduct before him in his secret chambers.

In other words, it is not enough that a judge be acting judicially to justify summary punishment. He must be holding *court* when the alleged contempt occurs.

III.

We advanced the proposition that a summary conviction based upon perjury, of the falsity of which the court has not personal knowledge, is a denial of due process (petition p. 12).

This basic proposition is not challenged by the respondent. But he seeks to avoid its operation by claiming that petitioner was not convicted of contempt based upon perjury alone.

To this there are two answers:

1. A summary conviction by an inquisitor for *any* contempt is a denial of due processe. Our argument is that a conviction for perjury, even if the perjured testimony had been given in *open court* is a denial of due process. Here there is such conviction and such denial of due process. It matters not therefore whether there was a conviction upon any other charge as well.

The fact is the sole basis of conviction is perjury.

When Judge Carr recessed the inquisition and opened court for the purpose of pronouncing judgment on petitioner, he stated "that the witness has wilfully and contemptuously declined and refused to answer questions of a particular nature put to him in the course of the (inquisitorial) inquiry; and for that reason it becomes the duty of the *court*" to adjudge guilt (R. p. 9). Upon petitioner's attorneys contacting Judge Carr with reference to an appeal he entered his written order in which he recited that he had adjudged petitioner guilty of "having failed and refused to answer proper questions put to him in such inquiry and having conducted himself in a contemptuous manner by returning evasive answers to proper questions propounded to him by the Assistant Prosecuting Attorney in attendance at the inquiry and by refusing to answer such questions, and by failing and refusing to obey the direction of the court to so answer, and by assuming and manifesting an insolent attitude toward this court" (R. p. 7).

Upon an appeal being taken, Judge Carr filed an amended return in which "he denies that said petitioner made truthful answers to questions put to him and states that the said Francis P. Slattery avoided disclosing to said Grand Jury important information within his knowledge" and "that the attitude of said witness upon the stand was contemptuous, his answers to questions propounded to him were evasive, and he failed and refused to answer proper questions propounded to him" (R. 59). Then after setting forth a transcript of part of the record before the inquisitor, he states that "the answers above referred to, given by the said Francis P. Slattery, to many of the questions put to him, indicated beyond question an intention upon his part to be evasive and refrain from testifying to facts obviously within his knowledge" (R. 65).

The partial transcript returned by Judge Carr shows upon its face that the witness never refused to answer a single question, that his language throughout was polite and respectful, and that the sole source of the complaint against him could be only that his answers affirming lack of knowledge were false. Any statements beyond this are mere conclusions misdescriptive of the witness' conduct. And mere conclusions are not binding on an appellate court.

Andrews v. King, 77 Me. 224.
Peo v. Blood, 120 App. Div. 614, 105 N. Y. S. 20.
Peo v. Westchester Co., 116 App. Div. 844, 102 N. Y. S. 402.
Forgan v. Gordon Motor Finance Co., 350 Ill. 445, 183 N. E. 462.

IV.

It is next urged that the principle that this court will acquiesce in the construction of state laws given by state courts of last resort, applies here; and since the Michigan court has passed upon all questions raised, this court will acquiesce in its decision. In other words, the claim is that state courts have the final determination as to whether a citizen's rights under the Federal Constitution have been violated.

That the cited principle has no application to cases involving questions arising under the United States Constitution, has been repeatedly and consistently held by this court.

In *Scott v. McNeal,* 154 U. S. 34, 38 L. Ed. 896, 14 S. Ct. 1108, it is said that the prohibitions of the Fourteenth Amendment "extend to all acts of the State, whether

through its legislative, its executive or *its judicial authorities,*" and it is held:

> "Upon a writ of error to review the judgment of the highest court of a state upon the ground that the judgment was against a right claimed under the Constitution of the United States, this court is no more bound by that court's construction of a statute of the territory, or of the state, when the question is whether the statute provided for the notice required to constitute due process of law, then when the question is whether the statute created a contract which has been impaired by a subsequent law of the state, or whether the original liability created by the statute was such that a judgment upon it has not been given due faith and credit in the courts of another state. In every such case, this court must decide for itself the true construction of the statute."

In accord are: *Grannis v. Ordean,* 234 U. S. 385, 34 S. Ct. 779, 58 L. Ed. 1363; *Coombs v. Getz,* 285 U. S. 434, 52 S. Ct. 435, 76 L. Ed. 866; *Dodge v. Board of Education,* 302 U. S. 74, 58 S. Ct. 98, 82 L. Ed. 57; *N. Y. Rapid Transit Corp. v. N. Y.,* 303 U. S. 573, 58 S. Ct. 721, 82 L. Ed. 1024; *Higgenbotham v. Baton Rouge,* 306 U. S. 535, 59 S. Ct. 705, 83 L. Ed. 968; *American Toll Bridge Co. v. R. R. Commission,* 307 U. S. 486, 59 S. Ct. 948, 83 L. Ed. 1414; *Irving Trust Co. v. Day,* 314 U. S. 556, 137 A. L. R. 1093, 62 S. Ct. 398, 86 L. Ed. 452.

V.

Finally it is argued that "the precise constitutional issue which petitioner urges for determination has been decided adversely to him by this court," in *Eilenbecker v. Plymouth County,* 134 U. S. 31, 10 S. Ct. 424, 33 L. Ed. 801.

That case merely decided that a respondent in a contempt proceeding is not entitled to a trial by jury, and can be of no help to this court.

CONCLUSION

It will be observed that the respondent has not challenged any of the propositions which we presented to the court. Instead he seeks to create new issues by misstating our position or by citing palpably inapplicable principles. The court is thus given assurance, from the very character of respondent's brief, of the soundness of the propositions which we have presented.

In our petition (footnote pp. 6 and 7), we indicated the regularity with which Michigan inquisitors violate the constitutional rights of citizens. The matter being thus one of general public interest, and this court being the last recourse of the Michigan citizen in the protection of their rights, the writ should issue as prayed.

Respectfully submitted,

WM. HENRY GALLAGHER,
Attorney for Petitioner.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

No. 633

FRANCIS P. SLATTERY,
Petitioner and Appellant,

v.

ALLAN A. MACDONALD, Sheriff of Ingham County,
Respondent and Appellee.

ON PETITION FOR REHEARING FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

Motion for Leave to File Brief as *Amicus Curiae* and Brief in Support Thereof

AMERICAN CIVIL LIBERTIES UNION,
Amicus Curiae.

ELMER H. GROEFSEMA,
WALTER M. NELSON,
PATRICK NERTNEY,
MAURICE SUGAR,
of the Michigan Bar,

OSMOND K. FRAENKEL,
of the New York Bar,
Of Counsel.

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Respondent and Appellee.

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

May it Please the Court:

The undersigned as counsel for the American Civil Liberties Union respectfully moves the Honorable Court for leave to file the accompanying brief in this case as *Amicus Curiae*. The consent of the attorney for the petitioner to the filing of this brief has been obtained. Counsel for respondent has failed to give his consent.

Special reasons in support of this motion are set out in the accompanying brief.

February 8, 1945.

OSMOND K. FRAENKEL,
Counsel, American Civil Liberties Union, Amicus Curiae.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

No. 633

FRANCIS P. SLATTERY,
Petitioner and Appellant,

v.

ALLAN A. MACDONALD, Sheriff of Ingham County,
Respondent and Appellee.

BRIEF OF AMERICAN CIVIL LIBERTIES UNION AS *AMICUS CURIAE* ON APPLICATION FOR REHEARING

The American Civil Liberties Union, having just been informed of the issues involved in this case, joins with petitioner in strongly urging this Court to reconsider its denial of petitioner's application for a Writ of Certiorari. The American Civil Liberties Union takes this position because it earnestly believes that the case presents an important question affecting the liberty of the residents of the State of Michigan which should receive full consideration by this Court.

Petitioner has been sentenced to serve a term of sixty days in jail on a charge of contempt of court without having had any hearing whatever prior to the adjudication of contempt. The Courts of the State of Michigan, and now the Federal Courts as well, have approved this

result on the theory that petitioner's acts were committed in the presence of the court. We believe that the result arrived at in this case does not properly reflect the views which this Court has previously expressed and that this result was arrived at only by mechanical application of basic principles not a real understanding of them.

It is, of course, self evident that the very essence of due process is an opportunity to be heard. In no field, other than that of contempt, would this Court for a moment countenance a conviction where there had been no notice of hearing or trial and where one man was not only prosecutor, judge and jury, but the only witness as well.

Even in the field of contempt, it has long been recognized that there is a limitation upon the power of the courts to punish in the manner we have just described. In this connection, we suggest that there has been some confusion because of the fact that punishment for contempt of court is always summary. That is to say, punishment for contempt does not involve the ordinary process of indictment and jury trial. But because summary punishment of this kind is constitutionally permissible (*Eilen Decker* v. *Plymouth County,* 134 U. S. 31) it does not follow that it is constitutionally permissible to punish for contempt without any hearing of any kind except in the rarest of cases.

The permissible exception to hearings in contempt cases should be confined to actual necessity, that is only to cases in which the contempt is of such a character as to affect the ability of the court currently to transact its business. Chief Justice Taft expressed this view clearly in *Cooke* v. *U. S.,* 267 U. S. 517, at page 534, where he said:

> "To preserve order in the court room for the proper conduct of business, the court must act

> instantly to suppress disturbance or violence or physical obstruction or disrespect to the court when occurring in open court. There is no need of evidence or assistance of counsel before punishment, because the court has seen the offense. Such summary vindication of the court's dignity and authority is necessary. It has always been so in the courts of the common law and the punishment imposed is due process of law. Such a case had great consideration in the decision of this Court in *Ex parte Terry,* 128 U. S. 289. It was there held that a court of the United States upon the commission of a contempt in open court might upon its own knowledge of the facts without further proof, without issue or trial, and without hearing an explanation of the motives of the offender immediately proceed to determine whether the facts justified punishment and to inflict such punishment as was fitting under the law."

Here again care must be taken to distinguish between those events which occur "in open court" and are of a character which justify punishment without hearing, those events which occur "in the presence of the court" and are of a character which justify punishment for contempt by summary process without trial by jury. In *Matter of Savin,* 131 U. S. 267, the contempt was of the latter character. There an order to show cause was issued and a hearing held on the charges.

But in the case at bar no order to show cause was issued and no hearing held. Yet nothing was done by petitioner, which within the language of Chief Justice Taft, could be described as consisting of "disturbance, violence, physical obstruction or disrespect to the court when occurring in open court". All that happened in the case at bar was that petitioner, with all possible respect for the court, persisted in stating that he could not remember whether certain events had occurred. He was

committed for contempt on the ground that this answer could not possibly have been a true one.

A case not unlike the case at bar was *Ex parte Hudgings*, 249 U. S. 378. There, as here, the witness was, after a hearing, adjudged guilty of contempt because he was unwilling to comply with the insistence of the judge that he answer a certain question positively. There, as here, the witness claimed that he was unable to remember. The events in that case, however, occurred in a trial in open court.

Nevertheless, this Court held that the conviction was unjustified because there was no basis for a finding that the witness' testimony constituted an obstruction to the performance of judicial duty. As Chief Justice White said, at page 383:

> "But the mistake is, we think, evident, since it either overlooks or misconceives the essential characteristic of the obstructive tendency underlying the contempt power, or mistakenly attributes a necessarily inherent obstructive effect to false swearing. If the conception were true, it would follow that when a court entertained the opinion that a witness was testifying untruthfully the power would result to impose a punishment for contempt with the object or purpose of exacting from the witness a character of testimony which the court would deem to be truthful; and thus it would come to pass that a potentiality of oppression and wrong would result and the freedom of the citizen when called as a witness in a court would be gravely imperiled.
>
> Testing the power to make the commitment which is under consideration in this case by the principles thus stated, we are of opinion that the commitment was void for excess of power—a conclusion irresistibly following from the fact that the punishment was imposed for the supposed perjury alone without reference to any circumstance or condition giving to it an obstructive effect."

These words are clearly applicable to the case at bar where the alleged contempt did not even occur in open court but in a private hearing where the judge was acting not as judge but as a grand jury. The rule of the *Hudgings* case has just been reaffirmed by this Court in *Ex parte Michael*, 90 L. Ed. Adv. 15, decided November 5, 1945.

We contend, therefore, that there was here no power to punish for contempt at all, much less power to punish for contempt without any hearing.

We respectfully submit that this case transcends in importance the particular case presented. The practice of one man grand juries is now well settled in Michigan. As an incident of that practice, punishment for contempt without hearing upon the basis of testimony offered before such one man grand juries has become common. This is a practice which strikes at the very heart of due process. It is a practice, which if not checked by this Court, may easily result in even graver infringements of liberty. These should be checked when they are first brought into the open. The occasion to perform a service in the cause of liberty is presented in this case. We respectfully urge this Court, therefore, to reconsider its previous refusal to hear the case.

American Civil Liberties Union,
Amicus Curiae.

Elmer H. Groefsema,
Walter M. Nelson,
Patrick Nertney,
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Of Counsel.

FEB 4 1946
CHARLES ELMORE CROPLE

United States of America
In the

Supreme Court of the United States

OCTOBER TERM, 1945

No. 633

FRANCIS P. SLATTERY,
Petitioner and Appellant,
vs.
ALLEN A. McDONALD, Sheriff of Ingham County,
Respondent and Appellee

PETITION FOR REHEARING

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(Unless otherwise clearly shown by context, figures in parentheses refer to pages of the printed record)

Now comes the Petitioner, by Wm. Henry Gallagher, his attorney, and respectfully shows:

FIRST: From the records and briefs herein the following propositions are established:

(a) Summary judgment of contempt, without charge, notice or hearing, for an offense committed in open court is an exception to the requirements of due

process. This exception is held to be justified by the necessity for the prompt vindication of the dignity of the court before the public, and applies only to offenses committed in open court.

(b) Due process of law requires that any contempt *not committed in open court,* and for which there is thus no necessity of prompt vindication of the Court's dignity before the public, be punished only after notice and a hearing.

(c) In the instant case the alleged contempt was not committed in open court. Yet summary judgment was imposed. Such summary conviction, without notice and a hearing, was a clear violation of the due process clause of the United States Constitution as amended.

(d) The unlawful summary judgment in this case is not an isolated case. It was in accordance with a uniform practice which has evolved in Michigan, and which has been sustained by the Michigan Supreme Court. Pursuant to that practice the rights of Michigan citizens under the due process clause are now consistently violated.

(e) By the decisions of the Michigan Supreme Court it is now the law of Michigan that one convicted of contempt on the basis of secret testimony before an Inquisitor is entitled to have returned to a reviewing appellate court only so much of the record, upon which his conviction is based, as the Inquisitor sees fit to return. Thus the alleged contemnor is not only denied a day in court on the charge, but is denied a review of the question whether, on the whole record, he was even *prima facie* guilty.

SECOND: The denial of relief to petitioner by this court constitutes a condonation of these violations of constitutional rights, operates as an encouragement of the Michigan Courts' continued invasions of such rights, and is fraught with grave consequences to the citizens of Michigan.

THIRD: That if this Court's action upon our petition, as was plainly the case in the District Court, was influenced by any presumption of guilt upon the part of petitioner, arising from the imperfect record returned, the following facts should be considered by this Court:

Petitioner has been in the banking and trust business all of his life. In 1941 a bill was introduced in the Michigan legislature designed to limit his employer bank in establishing branches. He was assigned by his employer to contact the members of the legislature and explain the reasons for its opposition to the pending bill.

In 1943, as the result of Inquisitor Carr's investigations, petitioner was arrested on September 13, 1943, on a charge of offering a bribe in 1941. A preliminary examination was held (69). The case presented against petitioner consisted of the unsupported testimony of a legislator to the effect that about noon of the day before the Bank Bill was acted upon by the House, a stranger, who was later identified as petitioner, approached the legislator and, standing in a doorway where he could be observed both from the House chamber and from the house cloak room, counted over some bills and said he would make it interesting for the legislator to oppose the Bank Bill (70).

Petitioner was arraigned upon this charge on January 7, 1944. On that day his attorney asked that his trial be fixed for the first day upon which a jury would be available, and reminded the court that petitioner was entitled

to a prompt trial under the Michigan Constitution. The State opposed this motion. The Judge stated he had never before heard of a defendant in a criminal case asking a prompt trial, commended petitioner for so doing, but denied petitioner's request (70).

Michigan law requires that one claiming an alibi must give written notice of the same, naming the supporting witnesses. (Act No. 80, P. A. 1939.) Petitioner accordingly gave notice that at the time of the alleged bribe offer he was attending a convention at Cheboygan, Michigan, and named as witnesses, among others, a prosecuting attorney of one Michigan county, an assistant prosecuting attorney of another county, and another member of the Michigan Bar (70).

For more than a year after petitioner's arrest he repeatedly sought to obtain a trial of the charge pending against him (71), but in vain, his constitutional right in that respect being ignored.

On November 8, 1944, while he was still awaiting trial, Inquistor Carr subpoenaed petitioner to appear before him forthwith. Petitioner communicated with his counsel who advised him that he would be obliged to honor the subpoena notwithstanding the pendency of the case against him, but warned him to make certain in giving his testimony that he understood the questions, to make clear that he had no personal knowledge when such was the case, and not to attempt to fix definite times, dates or other facts, by guess (71).

Petitioner then proceeded to Judge Carr's secret chambers and gave his testimony. In the course of this testimony he was asked whether an approach had been made to him in 1941 by a legislator in the lobby of a hotel. It will be noted that this question does not refer to any conduct on petitioner's part, but to the conduct of a third per-

son. Judge Carr says he has good reason to believe such an incident occurred. Possibly there was some jocular bantering of that nature. Certainly serious talks of such nature do not ordinarily occur in hotel lobbies. It is even possible that such an approach to petitioner might have been made without petitioner grasping the significance of such approach. But certainly petitioner is entitled to be confronted by his accuser, before judgment of guilt may be pronounced against him.

And note too, that when Judge Carr stated to petitioner that he had a right to a answer "yes" or "no" answer, that statement itself was incorrect and thus placed petitioner in a false position. Petitioner says that he understood from this incorrect statement of Judge Carr, that he had either to answer "yes" or go to jail for contempt. In this mental state petitioner asked "Do I have to answer a question that would incriminate me?" in an effort to express the thought "do I have to answer 'yes' in order to escape going to jail for contempt?" (52)

Wherefore, petitioner prays that a rehearing be granted on his petition for certiorari.

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Detroit 26, Michigan.

CERTIFICATE OF COUNSEL

I hereby certify that the foregoing petition is in my judgment well founded, was filed in good faith and was not filed for the purpose of delay.

WM. HENRY GALLAGHER,
Attorney for Petitioner.